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History of Federal American Indian Policy

The United States government's philosophy for dealing with the American Indians changed throughout history. Several different policies and programs were created and implemented over the years, typically with disappointing results for both sides.

Nineteenth-century federal policy was to relocate the American Indians on reservations and separate them from new settlers. **The Treaty Period** of 1789-1871 systemically and strategically attempted to destroy the social, cultural, and economic ability of the American Indian community to sustain themselves individually and as a society. Some 370 treaties were ratified by Congress, most of which provided large reservations of geographically distant and different land in exchange for the indigenous lands a tribe was forced to depart. These lands were often some other American Indian tribe's homeland. The land was typically of poorer quality, and often mismatched their traditional economy, whether agricultural or hunter-gatherer. Because American Indian cultures are so closely tied to their indigenous land bases, the outcome was not only a devastating loss of population, but a tremendous loss of identity and self-empowerment. Tribes were also frequently forced on long, treacherous marches to reach their new lands.

American Indians still remained an impediment to more white settlement. **The Treaty-Isolation Period** of 1871-1887 added a policy of cultural assimilation to that of reservation. Congress modified the official federal Indian policy from one of isolation and destruction to isolation and calculated assimilation to bring down Indian communities. These actions began the infamous period marked by the Boarding School and "Christianizing Agents" era when Indian children were moved from their families and sent to distant schools to learn a new language, culture, and belief system.

As problems with tribes persisted, Congress enacted the Dawes Act, in 1887, beginning the **Allotment Era**. In an effort to get American Indians to accept Euro-American economies and economic philosophy, tribal lands were divided up and given to heads of households within the tribes. This arrangement for individual allocations of property ran contrary to the communally-based social economics of American Indian cultures. It also opposed their sensibilities about belonging to the land, and not vice-versa. After two

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generations, the allotment system failed to restructure American Indian society. Furthermore, the land lost to non-Indians who were able to purchase or pay taxes on parcels led to further decimation of the resources of the tribes.

Although the American Indian family and community resisted attempts to change their culture and beliefs, their traditional ways were nonetheless nearly destroyed. Death and disease, the breakdown of the limited remaining land bases, and the continued removal of their children shattered their political and economic systems. The Bureau of Indian Affairs (BIA), created in 1824, took over nearly every function of the reservation. American Indian elders, once the cultural-based leaders, were deemed no longer qualified. BIA agents chose young leaders, educated in BIA boarding schools and more accepting of Euro-American culture to take charge of the people.

In 1934, the allotment system was ended and the **Indian Reorganization Period** began. While more progressive and sympathetic than earlier government programs, the primary goal of this policy was to assimilate the American Indians into white society. This was to occur through enlightened business-opportunities. Thus, Business Committees were established as reservation chief governing boards. This restructuring implemented formal government structure and law, but, as it was in the midst of the Great Depression, it did not last very long.

In 1944, the **Termination Period** began. Under termination, the special trust relationship between American Indian nations and the federal government would decline and then cease altogether. American Indians were encouraged to seek jobs and housing off reservations. People remaining on the reservation would do so without government aid. This policy was intended to cause rapid assimilation by forcing most American Indians off the reservations in order to survive. Public Law 280, passed in 1953, was one of a number of acts intended to end the federal responsibility over American Indians. In five states, Public Law 280 transferred civil and criminal jurisdiction over reservation Indians to all other states willing to assume jurisdiction. Utah elected to assume partial jurisdiction of the Paiute and Ute Tribes in 1971. The act was later amended to require the consent of the tribes before jurisdiction could be assumed.

In the late 1940s, the Bureau of Indian Affairs initiated its **Relocation Plan** to encourage American Indians to move to the cities, where there were jobs. Again, the goal was to have American Indians assimilate into the mainstream American life. By doing this, it was felt that American Indian people would have more opportunity to improve their circumstances. At the same time they would be absorbed into the mainstream and require less financial support from the government. In reality, however, most of the Indians who moved from the reservations to the city exchanged one form of poverty for another. The city environment and resulting culture shock proved daunting to many. A significant number couldn't afford decent food or housing, and soon found themselves on public aid once their government Relocation support ran out. The Indians placed much of the blame on the Bureau of Indian Affairs, which, they claimed, betrayed them by promising a better life if they left the reservations, then abandoning them once they settled in the city.

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The current policy of **self-determination** evolved from the 1960's Civil Rights and American Indian Movements. Indigenous governmental powers began to rise and many tribal nations began to recover powers and authorities once eroded by various state and federal actions. The formal federal practice of removing American Indian people from their families,

communities and land ended in 1978 with the passage of the Indian Child Welfare Act. This law made it illegal to remove Indian children from their homes. The Indian Education and Self-Sufficiency Act ratified in 1978 further supported the tribal communities' right of self-governance via self-sufficiency. The investigation in 1989 of into the BIA's alleged misuse of Indian monies made the break final. Most tribal governments have been operating with their own funds and with the ability to make their own informed decisions only since this time.

On September 8, 2000, at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs, Kevin Gover, Assistant Secretary of Indian Affairs issued a formal apology on behalf of the Bureau of Indian Affairs to American Indian people for the historical conduct of the agency. He said that, "by accepting this legacy, we accept also the moral responsibility of putting things right"

Tribal Sovereignty

American Indian people are distinct from many other ethnic groups and minorities in our country because they are descendants of the original indigenous inhabitants of this land. Tribal organizations pre-date the establishment of the United States. Recognizing this continuous structure, American Indian nations hold a unique political relationship with the federal government. They are recognized as sovereign nations.

Although sovereign in principle, American Indian tribes do not have the absolute sovereignty of an independent nation. That is they do not exercise international independence. Rather, they are considered a domestic dependent nation—a nation within a nation. This is similar to, but not as restricted as, the sovereignty of states within the United States. Federally recognized Indian tribes possess all the powers of a sovereign nation, unless treaties and acts of Congress specifically limit these powers.¹

Several types of legal arrangements outline the powers of tribes, including treaties, statutes, regulations and case law. Treaties are of limited use in determining the extent of tribal sovereignty. The groups and individuals that the federal government was dealing with in the 1800s and the tribes and bands we know today may not be quite the same.² In addition, some tribes and bands had no treaties. Moreover, sometime in the 1871 Congress passed a law which severely restricted the government's ability to enter into treaties, which many today view as a direct prohibition against the federal government entering into any further treaties with American Indians.

Legal Framework

When it comes to describing the law of American Indians, there are statutes, regulations and case decisions that have a far more reaching impact today than do treaties. Federal statutes are particularly important because Congress can unilaterally abrogate treaties. Case law, which interprets and construes treaties, policies and procedures of government agencies that implement treaties and executive orders, are also important.

From a legal perspective, laws and regulations pertaining to public lands affect Indian cultural, religious, and economic practices. Land use management affects the nature of the use of the forests by American Indians and their quality of life. The legal framework for public lands is designed to encourage people to act responsibly and to be protective rather than destructive of natural resources. It also provides for a greater sensitivity for how cultural

and religious needs of a tribe and its members can be met. In addition, there are numerous requirements to encourage and in many cases require public and tribal input into the use of public lands.

Forest management is legally mandated and certainly affects American Indian tribes, their use of the forests and their quality of life. Additional protection is afforded to activities and properties specific to American Indian tribes. These regulations were designed to protect practices, traditions, and artifacts for cultural, spiritual, and economic reasons. From an economic perspective, public lands produce taxes and fees that in turn provide government services and important benefits to Indian tribes and their members specifically or as part of the larger population.

A good understanding of the law informs people and public officials what they can and cannot do. The same applies to Indian tribes and its members. It is thus important that Indian tribes understand their role in the use and management of the public domain and the relationships and responsibilities inherent in government-to-government affairs. It also provides them with a greater sensitivity for how the cultural and religious needs of a tribe's members can be met. Everyone involved with the use and management of forest lands should therefore undertake to stimulate and broaden knowledge and understanding wherever and whenever possible.

Treaties

TREATY WITH THE UTAH, 1849.

Dec. 30, 1849. | 9 Stats., 984. | Ratified, Sept. 9, 1850. | Proclaimed, Sept. 9, 1850.
<http://digital.library.okstate.edu/kappler/Vol2/treaties/uta0585.htm>

TREATY WITH THE NAVAHO, 1849.

Sept. 9, 1849. | 9 Stat., 974. | Ratified Sept. 9, 1850. | Proclaimed Sept. 24, 1850.
<http://digital.library.okstate.edu/kappler/Vol2/treaties/nav0583.htm>

TREATY WITH THE EASTERN SHOSHONI, 1863.

July 2, 1863. | 18 Stats., 685. | Ratified Mar. 7, 1864. | Proclaimed June 7, 1869.
<http://digital.library.okstate.edu/kappler/Vol2/treaties/sho0848.htm>

TREATY WITH THE SHOSHONI-NORTHWESTERN BANDS, 1863.

July 30, 1863. | 13 Stats., 663. | Ratified Mar. 7, 1864 | Proclaimed Jan. 17, 1865.
<http://digital.library.okstate.edu/kappler/Vol2/treaties/sho0850.htm>

TREATY WITH THE WESTERN SHOSHONI, 1863.

Oct. 1, 1863. | 18 Stats., 689. | Ratified June 26, 1866. | Proclaimed Oct. 21, 1869.
<http://digital.library.okstate.edu/kappler/Vol2/treaties/sho0851.htm>

TREATY WITH THE UTAH-TABEGUACHE BAND, 1863.

Oct. 7, 1863. | 13 Stat., 673. | Ratified Mar. 25, 1864. | Proclaimed Dec. 14, 1864.
<http://digital.library.okstate.edu/kappler/Vol2/treaties/uta0856.htm>

TREATY WITH THE SHOSHONI-GOSHIP, 1863.

Oct. 12, 1863. | 13 Stats., 681. | Ratified Mar. 7, 1864 | Proclaimed Jan. 17, 1865.

<http://digital.library.okstate.edu/kappler/Vol2/treaties/sho0859.htm>

TREATY WITH THE UTE, 1868.

Mar. 2, 1868. | 15 Stats., 619. | Ratified, July 25, 1868. | Proclaimed, Nov. 6, 1868.

<http://digital.library.okstate.edu/kappler/Vol2/treaties/ute0990.htm>

TREATY WITH THE NAVAHO, 1868.

June 1, 1868. | 15 Stats., p. 667. | Ratified July 25, 1868. | Proclaimed Aug. 12, 1868.

<http://digital.library.okstate.edu/kappler/Vol2/treaties/nav1015.htm>

TREATY WITH THE EASTERN BAND SHOSHONI AND BANNOCK, 1868.

July 3, 1868. | 15 Stat., 673. | Ratified Feb. 26, 1869. | Proclaimed Feb. 24, 1869.

<http://digital.library.okstate.edu/kappler/Vol2/treaties/sho1020.htm>

Environmental & Land Use Laws, Regulations and Rules of General Application that Affect and Change Indian Use or Lifestyle

1. National Environmental Policy Act (NEPA)

NEPA applies to all public land and projects paid for with public monies. It defines policy on the environment, requires impact statements (including social and economic impacts), provides for other monitoring and regulatory programs (see 42 USC §§ 4321 et seq.).

2. Indian Environmental General Assistance Program Act of 1992

Provides for general assistance grants to Indian tribes and intertribal consortia to build capacity to administer environmental regulatory programs delegated to tribes by the Environmental Protection Agency (EPA) on Indian lands (see 42 USC § 436b).

3. Forest Renewal

16 USC §§ 1600.

4. Clean Water

Clean Water Act. (33 USC §§ 1251 et seq. and §§ 1323 et seq. 33 USC §§ 1251-1387) Indian tribes can regulate their water resources in same manner as states. Tribe can enforce its EPA approved standards against upstream users (see *Albuquerque v. Browner*, 97 F.3d 415, 10th Cir. 1996).

5. Water Rights

Reserved Water Rights. There are several different ways of establishing tribal water rights, which depend on how the tribe itself was recognized by the federal government. For reservations created by Congress, a tribe's water rights are established as of the date of the creation of their reservation, popularly known as Winters Doctrine (see *Winters v. United States*, 207 US 564, 1908). This doctrine extended to reservations created by executive order, and also applies to all other federal lands (see *Arizona v. California*, 83 S. Ct 1468, 1963), Indian water rights not created by use nor lost by nonuse (see *Hackford v. Babbitt*, 14 F.3d 1457, 10th Cir. 1994); holding the United States has right to litigate and protect its forest service and tribal water interests (*State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976). The extent of forest rights under the Winters Doctrine was restricted to watershed protection and timber production rather than acknowledging a more general purpose of protecting all forest uses (see

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United States v. New Mexico, 438 U.S. 696, 705 (1978)). Many forests are the headwaters for streams and rivers that are the source of downstream use by towns and municipalities, including Indian tribes. Water quality and water quantity are therefore important issues. Right of way provisions can be used to regulation diversion of forest water for development and other non-forest uses (43 USC §§1761(a) & 1765 (rights of way)).

6. Clean Air

42 USC §§ 7401 et. seq. Indian Tribes May Receive Grants and Contract Assistance to Effectuate Purposes of Act (§ 7601).

Forest Management as it Affects American Indian Tribes

In managing forest lands, the Forest Service must take into consideration the inter-dependence of the forest with the economies of communities. See 16 USC " 1600 - 1610 (The Forest and Rangeland Renewable Resources Planning Act of 1974, P.L. No. 93-378) (referred to as RPA); 36 CFR " 219 & 219.15. The Act requires an assessment of the nation's renewable resources, 16 USC ' 1601(a), from which a program for the management of such resources can be prepared and transmitted to the President. Id. at ' 1601. This act was later amended. See National Forest Management Act of 1976, P.L. 94-588 (1976) (codified at 16 USC " 1600 -1614 (1982) (referred to as NFMA). Non-commodity resources are protected and given equal treatment with commodity resources. 16 USC ' 531(a) (1982); see also S.Rep. No. 94-893 (94th Cong., 2d Sess. 10, reprinted in U.S. Code & Cong. & Admin. News 6662, 6671 (1976). NFMA details the methodology of such planning. See 16 USC 1604(c)-(m). The act requires the plans to provide for multiple use and sustained yield management of the resources obtained from the national forests.

The Forest Service is required to see that its planning recognizes the rights of American Indian tribes and Alaska natives. See 36 CFR ' 219.2(c)(3). As well, the National Environment Policy Act of 1969, 42 USC " 4321 - 4347 (NEPA), encourages all federal agencies, which includes the Forest Service, to engage in cooperative planning with other agencies and state and tribal governments. See 40 CFR ' 1501.7 (Council on Environmental Quality regulation requires in all NEPA and agency planning that the lead agency preparing the environmental impact statement consult with any affected Indian tribe to determine the scope of significant issues). The advent of NEPA was particularly important to forest management because it required the Forest Service to increase participation by other government agencies and the public; road-less area planning assumed greater significance because of the need for environmental impact statements; environmental planning required increase regulation of mining; and the agency began to develop more complete resource inventories.

In order to address State and private forestry issues, the Forest Service must establish a State Coordinating Committee. The Committee makes recommendations and establishes priorities in implementing forest policy. See 16 USC ' 2113. Forest Stewardship Plans, as well as other plans, may be devised for forest management. Id. Non-federal forest lands are also included in forest stewardship programs. 16 USC " 2101 et. seq. And, funding and technical assistance is available to state agencies, and others, for the protection and management of non-forest lands. 16 USC ' 2107.

The Forest Service has become increasingly subject to public and judicial scrutiny over the years. Administrative Procedure Act, " 5 USC 551-559, 701-706, 1305, 5372 (1982); see also

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The agency's records are open to the public. 5 USC ' 552 (1982) (Freedom of Information Act). The National Environmental Policy Act, 42 USC " 4431-4361 (1976) (referred to as NEPA), also enlarged the public's role. Congress has also taken an increased role in forest management.³

1. Tribal Interest/Use.

The management considerations required of the Forest Service specifically include Indian Tribes. See citations, above; see also the Forest Service Manual, FSM 7710 Policy, 7710.3(2) (requiring the Forest Service to involve and coordinate with local Indian Tribes in management planning). Indian Tribes may appeal decisions. See 36 CFR " 219.32-33 (objections and appeals); see also 36 CFR " 251.80 - 251.103.

Example: Pending Forest Service Planning & Management Report on Dixie, Fish Lake & Manti-LaSal National Forests, tribal consultation and involvement required. Planning documents must be capable of being understood and address certain specific uses and other matters. See 36 CFR ' 219.30.

Example: Forest planning must take into account Indian demographic trends, life style preferences and land settlement patterns. See 36 CFR ' 219.21(a)(1)(i).

Example: Indian tribes must be taken into account whenever a federal agency makes a regulation. See Executive Order No. 12866, September 30, 1993, Sec. 6 (a) (3) (B) (ii) (regulations must avoid undue interference with state, local or tribal government).

Example: The Forest Service must provide all governments, as well as the public, with notice and the right to comment on standards, criteria and guidelines that are applicable to Forest Service programs. See 36 CFR ' 216.1.

2. Hunting, Fishing and Trapping.

American Indians may hunt, fish and trap on forest lands. Under Utah law, Utah government regulates hunting and fishing throughout the state, including forest lands. The State has the right to regulate hunting, fishing and trapping by virtue of its ownership of all wildlife in the state. See *Utah Code Ann.* ' 23-13-3. The Forest Service regulations prohibit the taking of wildlife only to the extent it may violate federal or state law. 36 CFR ' 261.8; see also 36 CFR ' 241.1 - 2 (state law controls taking of most fish and game, forest personnel shall cooperate with state in wildlife management).

In some instances, treaties, statutes or other federal laws and regulations, as well as inter-governmental agreements, provide Indians with additional rights and protection.

Example: Navajo Treaty with United States. 15 Stat. 667, Art. 9 (1868). This treaty right allows tribal members to hunt on unoccupied ground in San Juan County (including the Manti-LaSal National Forest)⁴ contiguous to the reservation so long as there is sufficient game to justify the chase.

Example: Paiute Bands in Utah. The Paiutes were restored to federal trust status. See 25 USC " 761 - 768, and specifically 25 USC ' 762(c) (1980). Under Section 762(c), hunting rights were not restored. However, the Senate Report on the restoration bill advised members of Congress that hunting rights that survived the tribe's termination may in fact still exist. See Senate Report No. 96-481.

Example: The State of Utah has agreements with the Navajo, Shoshoni, Ute and Paiute

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tribes to set aside for use of tribal members an allotment of hunting permits.

Example: Indian lands are accorded special protection regarding hunting, fishing and trapping. This includes Indian lands that are near or adjacent to forest lands. The forest is not a sanctuary for poachers or others who would go to Indian lands and illegally take wildlife on nearby Indian lands. The federal government thus prohibits unlawful hunting or fishing on Indian land. See 16 USC ' 3372(a)(3)(A) (prohibits possession, transportation or sale of wildlife taken in violation of Indian tribal law). See *U.S. v. Gardner*, 244 F.3d 784 (10th Cir. 2001). Other provisions of federal law also protect Indians against illegal wildlife taking. See, e.g., 16 USC ' 3372 - 3373. In addition, Utah Division of Wildlife regulations prohibit hunting on Indian trust lands without tribal authorization. Ut ADC 657-5-13 (3).

Example: Bald Eagles and Eagle parts, particularly feathers, play an important role in American Indian religious and cultural life. The taking of Bald Eagles is illegal. However, an exception is made for Eagles and Eagle parts used for American Indian religious and cultural purposes. See 16 USC ' 668(a) and the permit system operated by the Department of Interior pursuant to 50 CFR ' 22.22; see also Executive Memorandum Policy, April 29, 1994 re: Native American Use of Eagle Feathers for Religious Purposes; Joint Interior and Commerce Order, June 5, 1997, Secretarial Order No. 3206 re: Federal Indian Trust Responsibilities and The Endangered Species Act.

Example: Hawk feathers or parts also play an important role in American Indian cultural and religious life. Normally, possession of hawk feathers is a violation of the Migrant Bird Treaty Act, 16 USC " 703, 707. Indians who are members of federally enrolled Indian tribes are exempt from prosecution under this law under a U.S. Department of Interior Policy issued in 1975. Indians may possess migratory bird parts. Non-Indians may not possess migratory bird parts and when they do they are thus subject to prosecution. See *U.S. v. Eagleboy*, 200 F.3d 1137 (8th Cir. 1999).

3. State & Indian Tribal Game Management.

State and Indian tribal governments have mutual interests in game management and regulation, including game on forest lands. Indian tribes have the right to participate in Utah state game management and planning pursuant to *Utah Code Ann.* ' 23-21-2.2. In that regard, Utah Division of Wildlife rule provide for five regional advisory councils. The councils consist of 12-15 members from each wildlife region in the State. One member of the council is from the U.S. Forest Service. Another member represents Native American Indians "where appropriate." Ut ADC R657-39-3(b)(vii); see also *Utah Code Ann.* ' 23-14-2.6 (creation of advisory councils). Regional advisory council gather information and make recommendations to the Division. Utah state government and Indian tribes may also enter into agreements for the management and regulation of wildlife and to settle disputes regarding treaty or other Indian hunting rights. See *Utah Code Ann.* ' 23-13-12.5.

Forest Service Role in Game Management. The Forest Service must cooperate with state, county and federal officials to enforce laws and regulations designed to protect wildlife, including entering into cross deputization agreements to enforce state game laws. 36 CFR ' 241.1. As seen above, a Forest Service official may sit on the State Regional Advisory Councils. In addition, the Forest Service must cooperate with state officials in wildlife management programs.

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4. Law Enforcement.

American Indians who commit offenses on Forest Lands are held to be accountable under the same laws as are other people. Its offenses on Indian Reservations that provide for tribal court (in misdemeanor cases) and/or federal court jurisdiction (in felony cases).⁵

On forest lands, both federal and state law enforcement have authority over crimes. See 16 USC ' 480. The State has civil and criminal jurisdiction over matters on forest lands and the existence of forest lands does not change this authority. Id; see also *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (federal government does not assert exclusive jurisdiction over public lands and state may enforce its criminal and civil laws). Of course, the federal government can also punish for offenses against its own laws, as when it does, such as enacting the penal provisions found in federal statutes or regulations, these laws supersede and preempt state laws. Id.

Indian violators would thus be treated the same as any other violator. However, there are exceptions. Often certain religious uses, e.g., where Indians use bald eagle feathers or parts, can bring them into conflict with conservation laws, but there is a system worked out where Indians are given permits. See 16 USC ' 668(a) and permit regulations, 50 CFR ' 22.22 (see narrative summary, Hunting, Fishing & Trapping).

Sources/Data:

General law enforcement authority for Forest Service special agents and law enforcement officer is found in 16 USC ' 559c, with authority to enter into cooperative arrangements with State or local law enforcement agencies. See 16 USC ' 559d. It is common for Forest Service Law Enforcement to be cross deputized to enforce state or county laws and local sheriffs and other state law enforcement officers to be given forest service designation, in order to make sure there is coverage at all times and for all situations. Also, there may be financial agreements between Forest and sheriffs or other local officers wherein the local law enforcement, using their powers under state law, are provided with funds to add law enforcement coverage on forest lands.

The delivery of law enforcement services pursuant to cooperative agreements, including budgeting data, can be documented by consulting with Forest Service law enforcement and state or local law enforcement, particularly the Sheriff's Office in the county with forest lands.

Laws and Regulations Affecting Religious & Cultural Practices

1. Religious/Cultural Site Protection.

The federal government recognizes that the spirit of the nation is founded upon and is reflected by its historic heritage. 16 USC ' 470 (National Historic Preservation Act). To implement this policy, the federal government must cooperate with and partner with governments and private organizations to provide financial and technical assistance to preserve historic and prehistoric resources. 16 USC ' 470-1. This specifically includes Indian tribes. 16 USC ' 470-1 & (6).

Specific to Indian interests, and interests that relate to the use of the forests, the federal government must take adequate measures to protect American Indian religious and/or cultural sites and locations. Toward this end, the Forest Service must provide notice to Indian tribes of possible harm to sites on its lands having religious or cultural importance. See 36 CFR ' 296.7. This includes the issuance of permits that may harm religious or cultural sites. 36 CFR

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' 296.7(a). Consultations with tribal officials may be undertaken if requested. Further, under this provision, the Forest land manager may enter into agreements with any Indian Tribe or other Native American group to determine the locations of sites that are of religious or cultural importance, including the determination of whether such sites should be withheld from public disclosure. See Id.

Sources/ Data:

42 USC ' 1966; PL 95-341; 92 Stat. 469; Executive Order No. 13007 (May 24, 1996) & Directive To Cooperate and Comply With Directives Relative To Inter-governmental Relations between Federal Government and Other Governments, including Indian Tribes, pursuant to 59 FR ' 22951, Executive Memorandum Policy (April 29, 1994) & 25 USC ' 450. Other pertinent Executive Orders are Order No's 12866 & 12875; see also Interior Department Manual, Part 512, Chapter 3, June 6, 1998 (Responsibilities For Protecting and Accommodating Access to Indian Sacred Sites.

Example: Paiutes. Paiute Tribes and bands were restored to status of official Indian Tribes. 25 USC ' 762(b): Restoration of all rights and privileges under treaties, executive orders, agreements and statutes "or other authority." The statutes and executive orders, cited above, especially President Clinton's Executive Order No. 13007, would therefore protect a Paiute sacred site, Fish Lake, in the Fish Lake National Forest.

2. Religious Freedom.

The right of American Indians to practice and protect their religious freedom is preserved by federal statute. 42 USC " 2000bb-2000bb-4.

Congress enacted laws protecting Native American religious practices, finding that court decisions had eliminated or restricted the requirement that the government justify burdens on the free exercise of religion through the compelling government interest test and by taking measures which were the least restrictive means of furthering that compelling government interest. These court decisions had imposed substantial burdens on the free exercise of Native American religious practices.⁶ All governments were required to refrain from substantially burdening a person's free exercise of religion.

3. Graves & Remains.

Federal and state laws protect and preserve the integrity of American Indian graves and remains.

(i) Federal law.

Federal law requires the identification and repatriation of human remains. See 25 USC " 3001 - 3013.

Federal law makes it a crime to traffick in Native American human remains and cultural items. See 18 USC ' 1170 and *U.S. v. Corrow*, 119 F.3d 796 (10th Cir. 1997), *cert. denied*, 522 U.S. 1133 (1998). Laws providing for the protection of graves and remains are closely related to laws protecting and preserving American Indian antiquities. See 16 USC ' 433.

Identification and repatriation of Indian remains and cultural objects are required under other provisions of federal law as well. See 20 USC ' 80q-9a (Smithsonian Institution required to identify and repatriate Indian remains, sacred objects and objects of cultural

patrimony).

Example: All Indian tribes and individual tribal members in Utah have an important interest in preservation and repatriation of remains and antiquities. As well, the Hopi tribe in Arizona has an interest in preservation and repatriation of remains and antiquities in surrounding states. All forest lands involved in the Forest study, Dixie, Fish Lake and Manti-LaSal, have graves and remains and antiquity sites requiring application and enforcement of the law.

Example: There are a variety of regulations which require the Forest Service to protect archaeological resources. See 35 CFR " 296.1 - 296.20. Notice must be provided to Indian tribes of possible harm or destruction to religious or cultural sites, especially if human remains may be involved. 36 CFR ' 296.7(b)(4). Criminal penalties are provided for illegal acts of excavating, removing or damaging archaeological resources on public lands or Indian lands, including selling, transporting or receiving artifacts. 36 CFR ' 296.4.

(ii) State Law.

Utah law requires the preservation and proper use of antiquities and ancient human remains state wide, with protection applicable to private as well as public property. *Utah Code Ann.* " 9-8-301 - 308, 401, 404 - 405.

Utah law also provides for criminal enforcement. See *Utah Code Ann.* ' 76-6-901 - 903 (cultural site protection, criminal enforcement); *Utah Code Ann.* ' 76-9-704 (abuse or desecration of dead human body, criminal enforcement).

Example: Criminal enforcement was undertaken against individuals alleged to be involved in the destruction and excavation of American Indian graves, antiquities and cultural sites in San Juan County, Utah. See *State v. Redd*, 954 P.2d 230 (Utah App. 1998); Rev'd 992 P.2d 986 (Utah 1999); later decision: 37 P.3d 1160 (Utah 2001).

4. Indian Arts and Crafts.

Federal law provides for the promotion and protection of genuine American Indian Arts and Crafts. The law also prohibits fake and counterfeit Indian goods. See 25 USC " 305 et seq. The law would apply to all Forest Service Visitors Centers, Concessionaires and sellers or traders using or occupying forest lands.

The law has created an Arts & Crafts Board. The Board promotes arts and crafts and the social and economic welfare of Indians and Indian tribes.

Federal law provides for criminal enforcement against those who misrepresent Indian arts and crafts. See 18 USC ' 1159.

Example: See, e.g., *U.S. v. Pourhassan*, 148 F.Supp. 2d 1185 (D. Utah 2001).

Federal law also allows the government, Indian tribes and individual Indians to bring civil action for damages and other relief to protect Indian arts and crafts. See 25 USC ' 305(e).

5. Gathering.

The Forest Service is authorized to sell timber and other natural resources. 16 USC ' 472a; see also 43 CFR ' 5420.0-6 (sale at appraised value).

Wood. Wood is gathered for ceremonial uses; arts & crafts; cooking; heating of homes or

businesses; posts or poles for fencing or other construction; economic self-sufficiency projects; therapeutic purposes; youth and other community-based service projects; habitation (particularly shade areas for summer living or for ceremonial purposes); and environmental education or training programs.

Plants: Collection of plants; seeds; flowers; other natural plant resource items for personal or ceremonial uses, medicinal and healing purposes, for arts & crafts, including ornamental uses, other business purposes, therapeutic purposes, education, especially school or environmental projects, and youth based or other community service based projects.

Wildlife: Certain animals that inhabit forests are very important to certain cultural and religious practices. For example, birds. See Narrative Summary, Hunting, Fishing and Trapping, above. Bears (who are found in forests, particularly the Manti-LaSal Forest) play an important role in Navajo culture.

The forest and its inhabitants may play a role in music, literature, poetry and other artistic endeavors.

Sources/Data:

Tribal Interviews and Research.

36 CFR ' 261.9 (prohibitions on plant damage or removal).

6. Economic Activities.

The Forest Service has the authority to issue permits for economic activities, including guides and outfitters and other commercial uses. 16 USC ' 551; see also *U.S. v. Richard*, 636 F.2d 236 (8th Cir. 1980), *cert. denied*, 450 U.S. 1033 (1981) (offense to undertake activity without receiving proper forest service permit); see also *U.S. v. Grimaud*, 31 S.Ct. 480 (1911).

Revenue that Produces Government Services for Tribal Members

1. School Impact Aid

Government Services: Impact Aid is a federal law that provides federal funds to local school districts as a method of compensating the district for the presence in the district of non-taxable federal lands and the presence of students on those lands who require basic public education services. The funds are used to finance general public education services in the District, including the financing of school construction.

Forest Component: The presence of Forest lands is a factor in determining eligibility for federal funds, as is the presence of school age children on the land. Children are also counted for purposes of determining the amount of funding.

Tribal Interest/Use: Tribal members on federal lands, including Indian Reservations, play a key role in determining whether and to what extent school districts receive Impact Aid funds. Congress also provided for input and control by Indian Tribes over the use of the funds provided that the funds must be spent on Indian children in a way that provides them with equal educational opportunities.

State or County Role: The use of impact aid funds is regulated by federal law, the United States Office of Education, and by the Utah State Board of Education. The school district receives and expends the funds. There is no direct involvement by county government.

Sources/ Data:

Recent amendments to the *No Child Left Behind Law* modify and clarify the use of Impact Aid funds (see 20 USC § 7702 – 771). For specific data on funds provided to state or local education agencies or districts, contact the US Office of Education; Utah State Board of Education; or local school districts, particularly the districts serving the counties containing the three forests and Indian tribal governments.

Example: San Juan County contains a large portion of the Manti-LaSal National Forest and other federal lands. Fifty per cent or more of the public school students in the San Juan County are American Indians. The District therefore receives a substantial portion of its budget of federal impact aid for the benefit of these students every year. Overall in Utah, school districts received \$7,703,017 in impact aid basic support payments in fiscal year 2002

(Footnotes)

¹ See *Forest Service National Resource Guide to American Indian and Alaska Native Relations*.

² For specific treaties see *Indian Affairs: Laws and Treaties, Volume II (Treaties)*, Compiled and edited by Charles J. Kappler, Washington, D.C.: Government Printing Office, 1904 – on the Internet <http://digital.library.arkstate.edu/kappler/Vol2/>

³ E.g., 16 USC " 528-531 (1982) (Multiple Use, Sustained-Yield Act of 1960, referred to as MUSYA) (specifies forests established and administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes, ' 528); 16 USC " 1131-1136 (1982) (National Wilderness Preservation Act of 1964); 16 USC " 1271 - 1287 (1982) (Wild & Scenic Rivers); 16 USC " 1531-1543 (1982) (Endangered Species Act).

⁴ Forest lands have been included in Indian treaty-hunting rights. *See State v. Arthur*, 261 P.2d 135 (Idaho 1953).

⁵ Major crimes are prosecuted by the federal government. *See* 18 USC " 1162, 1360; 18 USC ' 1152; 18 USC ' 1153. An Indian tribe may exercise criminal jurisdiction over Indians. *U.S. v. Wheeler*, 435 U.S. 313, 328 (1978), but not over non-Indians unless authorized by Congress. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁶ These cases were *Bowen v. Ray*, 476 U.S. 693 (1986); *Lying v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *Employment Division v. Smith*, 494 U.S. 872 (1990).

